NO. 91-892

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

M. RIEMER CALHOUN, JR. and SOUTHLAND PARK APARTMENTS, A LOUISIANA PARTNERSHIP *IN COMMENDAM*

Petitioners,

VERSUS

RANDOLPH T. ODINET, RONALD J. HAGGERTY, LOUIS P. WINESKI, JR., ROBERT J. CRITASI, JOHN A. METZLER, JR., GUS L. RIESS, JAMES J. LICCARDI, JR., FLOYD J. LANDRY, ASHLEY HENDERSON AND HENRY J. RODGRIGUEZ, JR., INDIVIDUALLY AND AS MEMBERS OF THE ST. BERNARD PARISH POLICE JURY

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether local elected officials have an absolute rather than a qualified immunity from suits for constitutional torts they commit arising out of their involvement with administrative permitting activities.

2. Does a federal court of appeals have appellate jurisdiction under 28 U.S.C. §1291 to review a claim of absolute immunity when the district court denies such a claim in a motion to dismiss on the grounds that factual issues necessary to resolve the immunity issue are in dispute.

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Petitioners,

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RANDOLPH T. ODINET, RONALD J. HAGGERTY, LOUIS P. WINESKI, JR., ROBERT J. CRITASI, JOHN A. METZLER, JR., GUS L. RIESS, JAMES J. LICCARDI, JR., FLOYD J. LANDRY, ASHLEY HENDERSON AND HENRY J. RODRIGUEZ, JR., INDIVIDUALLY AND AS MEMBERS OF THE ST. BERNARD PARISH POLICE JURY

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, M. Riemer Calhoun, Jr. ("Calhoun") and Southland Park Apartments, A Louisiana Partnership

In Commendam ("Southland Park"[1]) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 1, 1991.

OPINIONS BELOW

The Fifth Circuit's order denying petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* (App. A, p. A-1) is unreported; the Fifth Circuit's ruling on the merits (App. B, p. A-3) is reported at 937 F.2d 172; the slip opinion preceding the reported decision (App. C, p. A-9) is unreported; the Fifth Circuit's judgment on petitioners' Motion to Dismiss Appeal (App. D, p. A-15) is unreported; and the Ruling on Motion and Order of the United States District Court for the Eastern District of Louisiana (D.J. Livaudais) (App. E, p. A-16) is unreported.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §§1983 and 3601, Calhoun and Southland Park brought this suit in the Eastern District of Louisiana against St. Bernard Parish, the members of the St. Bernard Parish Police Jury individually and in their official capacities ("respondents"), and the Parish's Director of Safety and Permits, Martha L. Cazaubon. On August 27, 1990, the District Court denied the respondents' motion to dismiss the claims asserted against them individually by Calhoun and Southland Park on the basis of absolute and qualified immunity. (App. E, p. A-16).

On respondents' appeal, the Fifth Circuit, on August 1, 1991, entered a judgment and an opinion reversing the District Court's Ruling on Motion and Order and directed

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[1] Petitioner, Southland Park Apartments, a Louisiana Partnership *In Commendam*, had no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.

the District Court to dismiss Calhoun's and Southland Park's complaint against the respondents in their individual capacity for failure to state a valid claim for relief under Sections 1983 and 3601. (App. B, p. A-3). Calhoun's and Southland Park's Petition for Rehearing and Suggestion for Rehearing *En Banc* were each denied on August 29, 1991. (App. A, p. A-1).

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983. Civil action for deprivation of rights

> Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the

United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT

In 1987 Calhoun executed an option to purchase a parcel of land in lower St. Bernard Parish (a suburb of New Orleans, Louisiana) to construct the Southland Park Apartments for persons of low-to-moderate incomes. At the time Calhoun executed his option to purchase and throughout the time he conducted the necessary preparatory work, the site of the Southland Park Apartments was a conforming or permitted use under the Parish's Comprehensive Zoning Ordinance.[2] However,

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[2] The conforming classification of the property was crucial to the resolution of the immunity issue, but the Fifth Circuit's cavalier and mysterious treatment of this fact is a vivid example of its inflexible, wooden approach to the immunity issue. In its slip opinion, the Fifth Circuit erroneously stated that the relief Calhoun sought from the respondents was a zoning variance. Calhoun pointed out this error to the Fifth Circuit and the Fifth Circuit corrected the error by deleting any reference to a zoning variance before the case appeared in the reported decision, but did so without any notice to Calhoun of the change and more disturbing and inexplicable, without any revision to its legal analysis in light of this pivotal factual distinction, *to wit*:

Fifth Circuit's Slip Opinion at page 5026-7 (App. C, p.A-10):	Fifth Circuit's reported decision at 937 F.2d at 173 (App. B, p. A-4):
In 1987, Riemer Calhoun executed an option to purchase a parcel of land in St. Bernard Parish, hoping to construct low-to-moderate income housing. *The land did not have the requisite classification under a Parish's zoning ordinance. Calhoun was not*	In 1987 M. Riemer Calhoun executed an option to purchase a parcel of land in St. Bernard Parish, hoping to construct low-to-moderate income housing. As Calhoun was not a resident of the Parish, he decided to meet with one of the Police Jurors, Henry

when the preparatory work was complete and Calhoun sought to obtain a permit to construct the apartments, the respondents manipulated the Parish's administrative process to block the issuance of a building permit. The discriminatory effort was spearheaded by respondent, Henry J. Rodriguez ("Rodriguez") to which the other respondents acquiesced in the furtherance of an unwritten "gentlemen's agreement" because the Southland Park Apartments were to be built in Rodriguez's district.

In 1987, Calhoun met with Rodriguez. When Calhoun revealed his plans to construct the Southland

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Footnote 2 continued.

a resident of the Parish and needed support for a zoning change. He decided to meet with one of the Police Jurors, Henry Rodriguez.

Rodriguez, in order to secure backing for the project.

In their Petition for Rehearing and Suggestion for Rehearing *En Banc*, Calhoun and Southland Park brought to the Fifth Circuit's attention the serious misstatements of fact and under the true facts, its decision could not be reconciled with the decisions of this Court and the other federal circuit courts of appeals. Although the Fifth Circuit edited the facts between the time the slip opinion was issued and when this case was reported, the Fifth Circuit made no attempt to revise its legal analysis to conform with the corrected facts. Thus, the Fifth Circuit's legal analysis in its reported decision is based upon the wrong facts stated in its slip opinion involving an injury arising from a run-of-the-mill denial of a zoning variance. There is no legal analysis by the Fifth Circuit addressing petitioners' injuries under the restated and true facts quoted in the reported decision arising from the respondents' manipulation of the Parish's administrative procedures to block the issuance of the building permit.

The Fifth Circuit's right to edit its opinion to make syntactical improvements before its opinion is published may be one of its prerogatives. But to make a wholesale excision of pivotal facts, as the Fifth Circuit did here, raises serious questions as to whether the Fifth Circuit abused its prerogative. It at least demonstrates that the Fifth Circuit did not comprehend or appreciate the true facts when it analyzed the immunity issue.

Park Apartments, Rodriguez responded with a vitriolic denunciation of minorities and low-to-moderate income housing in general. In their conversation, Rodriguez exclaimed that he "opposed the apartments" because he did "not want those kind of people in St. Bernard Parish." When Calhoun questioned Rodriguez about what he meant by "those kind of people, " Rodriguez stated that

> We don't want those niggers and Vietnamese in St. Bernard Parish.

Rodriguez's express dislike of minorities also arose in his dealings with Charlotte Carroll, a Calhoun employee. In 1987, Ms. Carroll met with Rodriguez to persuade him not to block the issuance of a building permit. Ms. Carroll related the following conversation:

> He asked me to go with him, and he drove me through a very large complex that was very run-down. He didn't say "black," but he made a gesture to the black people that were walking around and in the complex. This is why we don't want any more apartments in our area because we don't want it to look like this. We don't want this in our community.

Shortly after these two conversations, Rodriguez, with the unanimous support of the other respondents, drafted, introduced and passed an interim construction moratorium on December 8, 1987 affecting a postage-stamp size area of St. Bernard Parish, including the proposed site of the Southland Park Apartments. The moratorium permitted all uses except "multi-family and commercial establishments." Although the moratorium was the first ever enacted by any elected body in St. Bernard Parish, and the Parish's enabling legislation did not permit the

passage of such moratorium, there was no discussion in the public record of the reasons for this unprecendented act.[3]

Rodriguez later expressed the true reason for the moratorium in a September, 1990 meeting that was transcribed:

> Someone can come next to your house and buy a piece of land next door and put a thirty-five unit apartment. It's not for the elderly or the handicapped. It's not for the older people, but it could be for low income people.
>
> * * * *
>
> With concerns to the thirty-five unit apartment complex that I speak of, we can squash that right here and right now. As a matter of fact, I voted against it on the St. Bernard Parish Police Jury to give these people a permit.

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[3] The respondents were not exercising their lawfully delegated zoning authority when they enacted the moratorium because Louisiana law strictly prohibited any action by the respondents without notice, hearing and a report by the Parish Planning Commission.

The zoning regulations specific to St. Bernard Parish are contained in La. Rev. Stat. Ann. 33:140.51-140.61 (West 1988), which define how the St. Bernard Parish Police Jury may control land use in St. Bernard Parish and may amend regulations and restrictions when needed. Section 140.54 requires a public hearing prior to establishing or amending a zoning regulation. Section 140.56 establishes the parish planning commission as the zoning commission for St. Bernard Parish. This provision requires that the zoning commission conduct a public hearing prior to making any recommendations to the Police Jury. Thus, until such time as the planning commission conducted its public hearing and presented its report to the respondents, Section 140.56 prohibited any action by the respondents on a zoning change. *Reynolds v. Licciardi*, 504 So.2d 654 (La. App. 4th Cir. 1987).

Rodriguez's influence in the permitting process was not limited to spearheading the passage of the moratorium. Rodriguez also manipulated the permit process when he directly "pressured" the Parish's permitting officer, Martha Cazaubon, to delay the issuance of Calhoun's building permit.[4]

After the enactment of three additional moratoria, the Parish finally relented and issued a building permit on April 4, 1989, but arbitrarily limited its use to housing for the "elderly" in order to control the make-up of the community. There is no separate classification for "elderly" under St. Bernard Parish's permitting laws. Calhoun's efforts to have the permit revised were unsuccessful and he filed this lawsuit seeking relief under 42 U.S.C. §§1983 and 3601 and the Fifth Amendment's "taking" clause.

During the discovery phase, the respondents moved to dismiss the complaint against them personally for failure to state a claim upon which relief can be granted (Rule 12(b)(6), Fed.R.Civ.P.) claiming that they were entitled to absolute and/or qualified immunity from suit. The District Court denied the respondents' motion to dismiss on the grounds that

> [t]here are serious issues of material fact left unanswered by defendants' motion to dismiss. It is apparent that under certain conditions

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[4] Ms. Cazaubon's capitulation to Rodriguez's pressure was one of the grounds for the District Court to deny her motion for summary judgment on qualified immunity grounds. This denial of qualified immunity was not appealed by Ms. Cazaubon. The Fifth Circuit's ruling is anomalous because it is based upon a meaningless distinction - Ms. Cazaubon, an administrative official, is answerable for her wrongs, while Rodriguez, an elected official, was relieved of all personal responsibility for his actions even though he was the most culpable wrongdoer of the two.

qualified or absolute immunity may not apply to these defendants. (App. E, p. A-16).

The respondents then took an appeal to the Fifth Circuit from the denial of their motion to dismiss. The respondents invoked the Fifth Circuit's jurisdiction under 28 U.S.C. §1291 to review "final decisions" of district courts based upon the collateral order exception to the final judgment rule.

Calhoun and Southland Park moved to dismiss the respondents' appeal. Because the District Court found that the record was not sufficiently developed factually to rule on the respondents' immunity defense, the District Court's judgment denying immunity did not fall within the collateral order exception as a "purely legal one" as required under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[5] The Fifth Circuit ruled that the motion to dismiss the appeal was to be "carried with the case," (App. D, p. A-15), but failed to rule on the motion and instead directly addressed the respondents' absolute or legislative immunity defense.

The Fifth Circuit reversed the District Court and, based upon a personal-official capacity distinction, held that the respondents were entitled to legislative immunity in their personal capacities "regardless of the allegations of

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[5] The respondents perfected their appeal despite the significant amount of discovery that had been conducted and was on-going during the time the appeal was pending. Moreover, during the time the immunity issue was pending on appeal, two pre-trial conferences were held and respondents brought a spate of motions which were all denied by the District Court — a summary judgment motion on behalf of Ms. Cazaubon claiming qualified immunity; a motion for summary judgment claiming that Calhoun's and Southland Park's claims were not "ripe," and a motion for summary judgment on the grounds that Calhoun's and Southland Park's claims were "moot." The Fifth Circuit apparently did not consider any facts adduced during discovery to be necessary to its resolution of the immunity issue.

discriminatory intent," but liability in their official capacities survived the motion to dismiss. (App. B, p. A-7). The Fifth Circuit made no determination that "overriding considerations of public policy" warranted the extension of legislative immunity. Instead, the Fifth Circuit hypothetically *assumed* as fact that the respondents exercised legislative judgment under its decision in *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) — a zoning variance case which did not involve allegations of discriminatory intent nor did it even raise an immunity issue. Thus, by a wooden, inflexible application of *Shelton*, the Fifth Circuit *expressly* rejected a long line of other federal circuit courts of appeals cases derived from this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) which hold that the deliberate manipulation of or interference with the issurance of a permit is an "administrative" or "executive" act to which absolute immunity does not apply. *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983). (App. B, p. A-6).

The Fifth Circuit accordingly ruled that "the order denying the appellants' motion to dismiss is reversed." (App. B, p. A-8).

REASONS FOR GRANTING THE WRIT

1. The Decision Below is Novel and Inconsistent with the Decisions of this Court and Directly at Odds with the Decisions of All Other United States Courts of Appeals.

The Fifth Circuit truly performed a Procrustean feat by holding that the respondents were absolutely immune from any personal liability for the constitutional torts they committed based upon its decision in *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). The analysis

employed by the Fifth Circuit is, however, intellectually bankrupt and in conflict with this Court's immunity analysis in *Hafer v. Melo*, ____ U.S. ____ (1991) where this Court held that state elected officials may be held personally liable for damages under Section 1983 for the constitutional wrongs they commit in their official capacities. This petition for a writ of certiorari should be granted to correct the manifest error of the Fifth Circuit below.

As this Court explained in *Hafer*, "officers sued in their personal capacity come to court as individuals" because "Congress enacted Section 1983 to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Hafer*, slip op. pgs. 4-5. Thus, absolute immunity has been extended to "a very limited class of officials" and the "officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue." *Hafer*, slip op. p. 6. And in *Forrester v. White*, 484 U.S. 219, 224 (1988), this Court recognized that it has been "cautious in recognizing claims that governmental officials should be free of the obligation to answer for their acts in court" and held that "officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overridding considerations of public policy."

The Fifth Circuit's reliance upon *Shelton* to resolve the immunity issue here involved a novel legal approach unlike the one employed by this Court in *Hafer* or *Forrester* or any other federal circuit court of appeals. In *Shelton*, the Fifth Circuit upheld the validity of a zoning variance denial on the grounds that its so-called "legislative model" allows it to justify a zoning decision by assigning "hypothesized purposes." 780 F.2d at 482. While the *Shelton* legislative

model may be a convenient way for the Fifth Circuit to remove most zoning cases from federal review, it is woefully deficient as a means to resolve an immunity question involving allegations of discriminatory intent. The *Shelton* legislative model's inflexible hypothetical approach to the immunity question is squarely at odds with the fact specific approach to the immunity issue employed by this Court in *Hafer* and *Forrester.*

The respondents do not fit within any identifiable "limited class of officials" to whom this Court has extended absolute or legislative immunity under its "functional" approach to immunities nor do the respondents fall within this "limited class of officials" solely because they are elected officials. Through its Procrustean application of *Shelton,* the Fifth Circuit lost sight of the rule that it is the nature of the act, not the identity of the actor who commits it, that determines whether immunity applies. *Hafer,* slip op. at 6; *Forrester,* 484 U.S. at 229.

The Fifth Circuit's reliance upon *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977) as support for its fact assumption that the respondents exercised "legislative judgment" is wholly misplaced. In *Arlington Heights,* the officials may have been exercising legislative judgment when they denied a zoning variance because they were acting under the authority of a comprehensive zoning plan with specified standards that applied both to the plaintiffs and the general community. However, the Fifth Circuit's misunderstanding of the facts (*supra,* fn. 1) and its zoning variance legal analysis, raises serious questions whether it actually understood that Calhoun's and Southland Park's injury did not arise from a denial of a zoning variance as presented in *Arlington Heights* and *Shelton,* but through the respondents' deliberate intrusion in and manipulation

of the Parish's permitting procedures.

The site of the Southland Park Apartments was a conforming use when Calhoun applied for a building permit. His injury arose from the respondents' deliberate intrusion into, and manipulation of, the Parish's administration of permits to advance racial and ethnic segregation in St. Bernard parish. The respondents' extraordinary intervention in and manipulation of the Parish's administrative permitting procedures were directed solely and specifically at one person: M. Riemer Calhoun, Jr. The purpose of that extraordinary intervention was experessed by Rodriguez: racial animus and segregationist views. The respondents' actions in no way possessed the prospective generality of legislative action and are not the acts of a legislator deserving of immunity.

Because of its apparent difficulty with the facts, the Fifth Circuit did not appreciate or quite grasp the significance of this Court's *caveat* in *Arlington Heights* that a sudden change in an existing zoning scheme in response to a proposal to erect integrated housing would require a different analysis and quite likely, a different result:

> For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case.

429 U.S. at 267.

The very issue this Court left open in *Arlington Heights* is presented here. Nevertheless, the Fifth Circuit, either intentionally or not, failed to squarely address the issue.

The respondents manipulated the permitting process, passed the moratoria in secrecy so that their actions were beyond public scrutiny, exceeded their bona fide legislative authority and did so for racial and ethnic reasons. Because the respondents' actions were so morally reprehensible and contrary to our notions of fairness, the respondents made no attempt factually to demonstrate, nor did the Fifth Circuit articulate reasons why "overriding considerations of public policy" compelled the extension of the exraordinary relief of absolute immunity to absolve them of all personal liability. The failure of the Fifth Circuit to base its decision upon this consideration does not comport with *Hafer* or *Forrester.* A rule that forces the respondents to obey the law and not discriminate on the basis of race or national origin is hardly an unwarranted and overly burdensome intrusion that would deflect them from the effective performance of their duties.

The Fifth Circuit's analysis and result is anomolous because no other federal court has found it to be an overly intrusive act by a federal court in the affairs of local officials to deny local officials the benefit of absolute immunity under facts similar to those presented in this case. Every other federal court that has engaged in a fact specific inquiry under the "functional" approach to the immunity issue has held that the deliberate manipulation of or interference with the issuance of a permit for reasons that violate the Constitution or federal law is an "administrative" or "executive" act to which absolute immunity does not apply. *Haskell v. Washington Township,* 864 F.2d 1266 (6th Cir. 1988); *Bateson v. Geisse,* 857 F.2d 1300 (9th Cir. 1988); *Bello v. Walker,* 840 F.2d 1124 (3rd Cir. 1988); *Cutting v. Muzzey,* 724 F.2d 259 (1st Cir. 1984); *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983); *Riccobono v. Whitpain Township,* 497 F.Supp. 1364 (E.D. Pa. 1980); *Fralin & Waldron, Inc. v. County of Henrico, Va.,*

477 F.Supp. 1315 (E.D. Va. 1979).

The above cases rest upon this Court's rationale that, when public officials who possess legislative responsibilities exercise administrative powers, they can only claim qualified immunity. *Forrester,* 484 U.S. at 224; *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). *See, Developments in the Law - Zoning,* 91 Harv.L.Rev. 1427 (1978). As this Court recognized in *Harlow,* "qualified immunity represents the norm." 457 U.S. at 807.

Consistent with this Court's precedents, such as the rationale in *Hafer,* the above circuit courts of appeals and district courts recognize that the titles and status of local officials are not talismanic: if local officials initiate action in response to hysteria and unfounded fears of multi-family housing through interferences with the administrative permitting process, they lose their cloak of immunity. Unfortunately, the Fifth Circuit is the only court that has not sent such a clear signal to local officials.

The Fifth Circuit's holding in this case cannot be reconciled with *Hafer* or the rule of law established in the other federal circuit courts of appeals. An even more compelling reason to grant this writ of certiorari is that the respondents presented no factual reasons why the Fifth Circuit should adopt a distinct minority rule in light of the allegations of racial discrimination. Nor did the Fifth Circuit offer compelling reasons on its own, other than a Procrustean application of *Shelton,* to support this extraordinary extension of absolute immunity under the facts of this case.

2. The Decision Below that Denial of an Absolute Immunity Claim is an Appealable Collateral Order Raises Important and Unresolved Problems.

By directly addressing the respondents' claims of absolute immunity, the Fifth Circuit implicity held that the denial of respondents' motion to dismiss was properly before it under the "collateral final order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

In ruling on the respondents' appeal, the Fifth Circuit was required to construe Calhoun's and Southland Park's complaint in a light most favorable to them and accept all well-pleaded facts as true. *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977). As this Court stated in *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Since, under *Conley*, all allegations pled by Calhoun and Southland Park in their complaint and the inferences to be drawn from the allegations were to be taken as true, there is a serious question as to whether it was proper for the Fifth Circuit to decide the immunity issue on a factually incomplete record.

The District Court specifically found that "serious issues of material fact [were] left unanswered by defendants motion to dismiss." (App. E, p. A-17). Thus, because facts necessary to resolve the immunity issue were in dispute, the District Court's denial of the respondents' motion to dismiss lacked collateral finality because the Fifth Circuit was not faced with a pure legal issue as required under *Mitchell v. Forsyth*, 472 U.S. 511, 527, fn. 9 (1985):

> ... the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of a clearly established law."[6]

The Fifth Circuit side-stepped the *Mitchell* requirement through an extension of its *Shelton* legislative model by assigning "hypothesized purposes." Thus, in order to address the immunity issue, the Fifth Circuit conveniently ignored the deposition testimony, affidavits and exhibits which were part of the record and which the District Court reviewed, but were not before the Fifth Circuit given the unusual procedural posture of the appeal. The Fifth Circuit's approach cannot be reconciled with *Mitchell.*

Furthermore, the Fifth Circuit's assignment of collateral finality to the District Court's denial of the respondents' motion to dismiss did not further the purpose of preventing "insubstantial lawsuits" against public officials from coming to trial. *Harlow,* 457 U.S. 800 at 819. The respondents' actions remain subject to federal review, and they remain as defendants in their official capacity (defended by the same counsel who defended them in their personal capacities). Moreover, for collateral finality to turn on a personal-official capacity distinction conflicts with *Hafer.* Hence, nothing was gained by the Fifth Circuit's decision and much will be lost in future cases where the immunity issue is based upon a factually incomplete record.

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[6] If a different panel of the Fifth Circuit had decided the motion to dismiss the respondents' appeal, the result would arguably been different. Other panels of the Fifth Circuit have held that immunity issues that involve issues of fact do not constitute a pure issue of law as required under *Mitchell* and are not appealable as a *Cohen*-type collateral order. *Johnson v. Odom,* 910 F.2d 1273 (5th Cir. 1991); *Feagley v. Waddill,* 868 F.2d 1437 (5th Cir. 1989).

CONCLUSION

Few principles of law are more firmly stitched into our constitutional fabric than the concept that a local government may not punish or discriminate on account of race or national origin. Certiorari should be granted here to review the decision below of the United States Court of Appeals for the Fifth Circuit who extended absolute immunity under an analysis that cannot be reconciled with this Court's *Hafer* decision and is in conflict with the decisions of all other federal circuit courts of appeals. If Calhoun and Southland Park are correct in urging that the District Court's denial of respondents' motion to dismiss was not immediately appealable as a *Cohen*-type collateral order because material issues of fact are in dispute, then the matter should be remanded to the District Court for appropriate disposition, after a full development of the facts bearing upon the immunity issues.

Respectfully submitted,

DAVID M. CULPEPPER

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Attorneys for M. Riemer Calhoun, Jr.
and Southland Park Apartments, A
Louisiana Partnership *In Commendam*

November 22, 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3694

FILED
AUG 29 1991

M. RIEMER CALHOUN, JR., ET AL.,
Plaintiffs-Appellees,

versus

ST. BERNARD PARISH, ET AL.,
Defendants,

RALPH T. ODINET, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 1, 5 Cir., 1991, ____F.2d____)

(August 29, 1991)

Before REAVLEY, HIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX B

M. Riemer CALHOUN, Jr., et al.,
Plaintiffs-Appellees,

v.

ST. BERNARD PARISH, et al.,
Defendants,

Randolph T. Odinet, et al.,
Defendants-Appellants.

No. 90-3694.

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1991.

Developer of low to moderate-income housing project brought civil rights action against parish police jurors involved in adopting series of construction moratoria. The United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., J., denied jurors' motion to dismiss, and they appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that jurors were entitled to legislative immunity against damages in their individual capacities even though spot zoning rather than zoning ordinance was involved.

Reversed.

Charles T. Weigel, Lisa Miley Geary, McGlinchey, Stafford, Cellini & Lang, New Orleans, La., for defendants-appellants.

David McLean Culpepper, Murray Andrew Calhoun, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, La., for plaintiffs-appellees.

Appeal From the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, HIGGINBOTHAM, and DUHE', Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

M. Riemer Calhoun's attempts to construct a low-to moderate-income housing project were frustrated by a series of construction moratoria issued by St. Bernard Parish. He sued the Parish, the Parish's Police Jurors, and the Director of the Parish's Department of Safety and Permits. The suit attacked the ordered delays. The district court denied the Police Jurors' motion to dismiss the claims against them individually on the basis of either absolute or sovereign immunity. They appeal. Finding that the Police Jurors are entitled to a legislative immunity against damages in their individual capacities, we reverse.

In 1987, M. Riemer Calhoun executed an option to purchase a parcel of land in St. Bernard Parish, hoping to construct low-to moderate-income housing. As Calhoun was not a resident of the Parish, he decided to meet with one of the Police Jurors, Henry Rodriguez, in order to secure backing for the project.

Calhoun first discussed the project with Rodriguez in November of 1987, and according to Calhoun, "Rodriguez responded with a vitriolic denunciation of minorities and low to moderate income housing in general." In a meeting later that year, Rodriguez made similar remarks to one of

Calhoun's employees, Charlotte Carroll. Rodriguez later drafted and introduced an interim construction moratorium affecting a small area of land, including Calhoun's parcel, and on December 8, 1987, the Police Jury passed the moratorium. Although the moratorium was the first ever enacted by the Police Jury, there is no discussion in the public record of the reasons for its enactment.

The moratorium was due to expire on April 5, 1988, but the Police Jury met and voted to extend the moratorium and increase the required setback from 150' to 250'. Calhoun forged ahead with his project, modifying his plans to include a 250' setback and applying for a building permit. While his application was pending, the Police Jury enacted two more moratoria.

After a lengthy delay, the Parish finally issued the building permit on April 4, 1989, but limited its use to housing for the elderly. Calhoun's efforts to have the permit revised met with little success. Calhoun eventually filed suit in the district court below, alleging violations of 42 U.S.C. §§ 1983 and 3601 and the takings clause of the Fifth Amendment. The Police Jurors moved to dismiss the claims against them individually on the basis of either absolute or qualified immunity, but the district court denied the motion. They appeal.

The Supreme Court has adopted a functional approach to immunities. As the Court recently explained in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988), "we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evalute the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *See also Butz v. Economou*, 438 U.S. 478, 511, 98 S.Ct. 2394,

2913, 57 L.Ed.2d 895 (1978). With this approach, the Court has extended legislative immunity both to appointed members of a regional planning agency, in a suit challenging one of the agency's ordinances, and to the justices of a state supreme court, in a suit challenging a provision of a state bar code promulgated by the court. *See Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

Similarly, this court has extended legislative immunity to a mayor for his veto of two rezoning ordinances. We reasoned:

> When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision-making as is the vote of a member of Congress, a state legislator, or a city councilman.

Hernandez v. City of Lafayette, 643 F.2d 1188, 1194 (5th Cir.1981). *See also Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129 (5th Cir.1986) (remanding issue of legislative immunity of school board).

Although this court has always viewed zoning as a legislative function, at one point, we distinguished "true" zoning ordinances from spot zoning. In *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir.1977), we held that a city council resolution aimed at one business was not a zoning ordinance. "Zoning ... connotes a non-particularized legislative process in which rules are promulgated and land areas designated on a general, prospective basis." *Id.* Other circuits, cited extensively by Calhoun in his brief, have adopted similar distinctions between

general and particularized ordinances. *See, for example, Bateson v. Geisse,* 857 F.2d 1300 (9th Cir.1988); *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir.1983).

In *Shelton v. City of College Station,* 780 F.2d 475 (5th Cir.1986), this circuit put *Bayou Landing* and its progeny to rest. In *Shelton,* we held that the denial of a request for a variance from a zoning ordinance was a legislative decision. *Shelton* rested in part on the state's constitutionally secured right to construct its own procedural apparatus for resolving zoning matters; that it chose to do so in a manner that resembled judicial decisionmaking did not mean that the zoning decisions were not legislative. It followed that the decision at issue was a legislative judgment, an evaluation of legislative facts, even though the legislative decision was not the initial enactment of a zoning code. Rather, the spot zoning remained legislative in character. The result in *Shelton* accords with *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), where the Court evaluated the denial of a request for rezoning of a specific parcel of property as a legislative act.[1]

Shelton controls the legislative immunity issue in this case. The Police Jurors of St. Bernard Parish are entitled to a legislative immunity against damages in their individual capacities. This holds true regardless of the allegations of discriminatory intent. As the Supreme Court has warned:

---

[1] Several later decisions have mentioned the underlying distinction in *Bayou Landing,* but only in dicta. *See Jackson Court Condominiums v. City of New Orleans,* 874 F.2d 1070, 1074 n. 3 (5th Cir.1989); *County Line Joint Venture v. Grand Prairie, Tex,* 839 F.2d 1142, 1144-1145 (5th Cir.1988). Curiously, both Calhoun and the appellants cited *Bayou Landing* in their briefs to this court but, for the most part, omitted *Shelton.*

> "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

Tenney v. Brandhove, 341 U.S. 367, 378, 71 S.Ct. 783, 789, 95 L.Ed. 1019 (1951). This does not mean that the state action is constitutional or that the action can stand. Calhoun's claims for injunctive and declaratory relief against the appellants in their *official* capacities survive the motion to dismiss.

The order denying the appellants' motion to dismiss is REVERSED.

APPENDIX C

M. Riemer CALHOUN, Jr., et al.,
Plaintiffs-Appellees,

v.

ST. BERNARD PARISH, et al.,
Defendants,

Randolph T. Odinet, et al.,
Defendants-Appellants.

No. 90-3694.

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1991.

Developer of low-to moderate-income housing project brought civil rights action against parish police jurors involved in adopting series of construction moratoria. The United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., J., denied jurors' motion to dismiss, and they appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that jurors were entitled to legislative immunity against damages in their individual capacities even though spot zoning rather than zoning ordinance was involved.

Reversed.

Appeal From the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, HIGGINBOTHAM, and DUHE, Circuit Judges.

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M. Riemer Calhoun's attempts to construct a low- to moderate-income housing project were frustrated by a series of construction moratoria issued by the Parish. He sued St. Bernard Parish, the Parish's Police Jurors, and the Director of the Parish's Department of Safety and Permits. The suit attacked the ordered delays. The district court denied the Police Jurors' motion to dismiss the claims against them individually on the basis of either absolute or sovereign immunity. They appeal. Finding that the Police Jurors are entitled to a legislative immunity against damages in their individual capacities, we reverse.

I

In 1987, Riemer Calhoun executed an option to purchase a parcel of land in St. Bernard Parish, hoping to construct low- to moderate-income housing. The land did not have the requisite classification under a Parish's zoning ordinance. Calhoun was not a resident of the Parish and needed support for a zoning change. He decided to meet with one of the Police Jurors, Henry Rodriguez.

Calhoun first discussed the project with Rodriguez in November of 1987, and according to Calhoun, "Rodriguez responded with a vitriolic denunciation of minorties and low to moderate income housing in general." In a meeting later that year, Rodriguez made similar remarks to one of Calhoun's employees, Charlotte Carroll. Rodriguez later drafted and introduced an interim construction moratorium affecting a small area of land, including Calhoun's parcel, and on December 8, 1987, the Police Jury

passed the moratorium. Although the moratorium was the first ever enacted by the Police Jury, there is no discussion in the public record of the reasons for its enactment.

The moratorium was due to expire on April 5, 1988, but the Police Jury met and voted to extend the moratorium and increase the required setback from 150' to 250'. Calhoun forged ahead with his project, modifying his plans to include a 250' setback and applying for a building permit. While his application was pending, the Police Jury enacted two more moratoria.

After a lengthy delay, the Parish finally issued the building permit on April 4, 1989, but limited its use to housing for the elderly. Calhoun's efforts to have the permit revised met with little success. Calhoun eventually filed suit in the district court below, alleging violations of 42 U.S.C. §§ 1983 and 3601 and the takings clause of the Fifth Amendment. The Police Jurors moved to dismiss the claims against them individually on the basis of either absolute or qualified immunity, but the district court denied the motion. They appeal.

The Supreme Court has adopted a functional approach to immunities. As the Court recently explained in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988), "we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *See also Butz v. Economou*, 438 U.S. 478, 511, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978). With this approach, the Court has extended legislative immunity both to appointed members of a regional planning agency, in a suit challenging one of the agency's ordinances, and to the justices of a

state supreme court, in a suit challenging a provision of a state bar code promulgated by the court. *See Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

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> When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision-making as is the vote of a member of Congress, a state legislator, or a city councilman.

Hernadez v. City of Lafayette, 643 F.2d 1188, 1194 (5th Cir.1981). *See also Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129 (5th Cir.1986) (remanding issue of legislative immunity of school board).

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In *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.1986), this circuit put *Bayou Landing* and its progeny to rest. In *Shelton*, we held that the denial of a request for a variance from a zoning ordinance was a legislative decision. *Shelton* rested in part on the state's constitutionally secured right to construct its own procedural apparatus for resolving zoning matters; that it chose to do so in a manner that resembled judicial decisionmaking did not mean that the zoning decisions were not legislative. It follows that the decision at issue was a legislative judgment, an evaluation of legislative facts, even though the legislative decision was not the initial enactment of a zoning code. Rather, the spot zoning remained legislative in character. The result accords with *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), where the Court evaluated the denial of a request for rezoning of a specific parcel of property as a legislative act.[1]

Shelton controls the legislative immunity issue in this case. The Police Jurors of St. Bernard Parish are entitled to a legislative immunity against damages in their individual capacities. This holds true regardless of the allegations of discriminatory intent. As the Supreme Court has warned:

> "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self discipline

---

[1] Several later decisions have mentioned the underlying distinction in *Bayou Landing*, but only in dicta. *See Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070, 1074 n. 3 (5th Cir.1989); *County Line Joint Venture v. Grand Prairie, Tex.*, 839 F.2d 1142, 1144-1145 (5th Cir.1988). Curiously, both Calhoun and the appellants cited *Bayou Landing* in their briefs to this court but, for the most part, omitted *Shelton*.

> and the voters must be the ultimate reliance for discouraging or correcting such abuses."

Tenney v. Brandhove, 341 U.S. 367, 378, 71 S.Ct. 783, 789, 95 L.Ed. 1019 (1951). This does not mean that the state action is constitutional or that the action can stand. Calhoun's claims for injunctive and declaratory relief against the appellants in their *official* capacities survive the motion to dismiss.

The order denying the appellants' motion to dismiss is REVERSED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3694

FILED
NOV 13 1990

M. RIEMER CALHOUN, JR., ET AL.,
Plaintiffs-Appellees,

versus

ST. BERNARD PARISH, ET AL.,
Defendants,

RANDOLPH T. ODINET, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before KING, GARWOOD and DUHE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee(s) to dismiss the appeal is *carried with the case.*

APPENDIX E

MINUTE ENTRY
LIVAUDAIS, J.
AUGUST 27, 1990

FILED
AUG 27 '90

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M. RIEMER CALHOUN, JR., ET AL CIVIL ACTION

versus NO. 89-5160

ST. BERNARD PARISH, ET AL SECTION: E/6

RULING ON MOTION
and
O R D E R

The motion of defendants, Randolph T. Odinet, Ronald J. Haggerty, Louis P. Wineski, Jr., Robert J. Critassi, John A. Metzler, Jr., Gus L. Riess, James L. Licciardi, Jr., Floyd J. Landry, Ashley Henderson, Henry J. Rodriguez, Jr. and Martha L. Cazaubon (hereinafter "defendants") to dismiss was submitted on a prior date.

Clearly, there are areas where a public official is protected by absolute immunity. *Hernandez v. City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981). However, the Fifth Circuit indicated in *Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 135 (5th Cir. 1986) that:

DATE OF ENTRY AUG 28 1990

> It follows that not everything an official with legislative duties does is protected by absolute immunity. When an official possessing legislative responsibilities engages in official activities insufficiently connected with the legislative process to raise genuine concern that an inquiry into the motives underlying his actions will thwart his ability to perform his legislative duties vigorously, openly and forthrightly, he is not entitled to absolute immunity grounded in good faith that is bestowed upon other governmental officials.

Thus, when public officials who possess legislative duties exercise administrative powers, they can only claim qualified "good faith" immunity. *Harlow v. Fitzgerald*, 457 U. S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

This case concerns plaintiffs' entitlement to a building permit. The Fifth Circuit held in *Hornsby v. Allen*, 326 F. 2d 605, 608 (5th Cir. 1964):

> ...we do not conceive the denial of an application for a license to be an act of legislation.

The granting or denial of an individual's application has been held to be an administrative function. In *Folsom Road Civil Association v. Parish of St. Tammany*, 407 So. 2d 1219, 1224 (La. 1981), the Louisiana Supreme Court stated:

> Because the issuance of permits is an administrative function, a permit must issue as a matter of law once the listed requirements are satisfied.

There are serious issues of material fact left unanswered by defendants' motion to dismiss. It is

apparent that under certain conditions qualified or absolute immunity may not apply to these defendants.

Accordingly,

IT IS ORDERED that defendants' aforementioned motion be DENIED.